

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:)	Chapter 7 Case
)	Number <u>94-60116</u>
MARY A. WEAVER)	
)	
Debtor)	
_____)	
)	
MARY A. WEAVER)	FILED
)	at 3 O'clock & 20 min. P.M.
Movant)	Date: 3-30-95
)	
vs.)	
)	
FEDERAL DEPOSIT INSURANCE)	
CORPORATION)	
)	
Respondent)	

ORDER

Pursuant to notice hearing was held on the debtor's Motion to Avoid the Lien of Federal Deposit Insurance Corporation ("FDIC"), receiver for Goldome Acceptance Corporation ("Goldome"), with response by FDIC. Based upon the evidence presented and briefs submitted I make the following findings of fact and conclusions of law denying the motion.

The Motion to Avoid Lien seeks to avoid the interest claimed by the FDIC in one 1888 Destiny mobile home, serial number

15337 ("the mobile home"), for which the debtor signed an agreement to purchase from Bonanza Mobile Homes, Inc. ("Bonanza"), a mobile home dealer. The agreement is dated December 14, 1990. Bonanza came into possession of this mobile home as the agent for Goldome, holder of the first priority lien on the mobile home under the certificate of title issued March 28, 1988 to James B. Barker, the original purchaser of the mobile home. According to the testimony of Marie Simon,¹ after James B. Barker's default to Goldome, Bonanza was asked to serve as Goldome's agent for the purpose of repossession and resale of the mobile home. The mobile home was repossessed and placed on Goldome's lot for resale. The title was not transferred as Goldome's policy was to transfer title upon resale. See Official Code of Georgia Annotated (O.C.G.A.) § 40-3-34(b)².

¹Marie Simon is an employee of Niagara Asset, a servicing company for the FDIC, and formerly worked for Goldome. Her combined employment for the two companies totals ten years.

²O.C.G.A. § 40-3-34 provides for transfer of vehicles by operation of law, stating in the last sentence of subsection (b) that,

If the holder of a security interest or lien succeeds to the interest of the owner and holds the vehicle for resale, he need not secure a new certificate of title but, upon transfer, shall promptly deliver to the transferee the last certificate of title, if available, and such other documents as the commissioner may require by rule or regulation.

This Code section authorizes Goldome's practice of waiting until

On December 14, 1990, Mary Weaver signed an agreement to purchase the mobile home from Bonanza (Debtor's Exhibit 1), which agreement provided below the signature line that it was "Approved Subject to acceptance of financing by bank or finance company." Financing was to be provided by Goldome. At the time this agreement was signed, Dan West, a representative of Bonanza, received an initial credit authorization from Goldome and on this preliminary approval accepted Ms. Weaver's \$1,000 cash down payment³ and had the mobile home delivered to Ms. Weaver. FDIC maintains that final approval of financing was a condition precedent to enforceability of the agreement to purchase and that financing was declined, as a result of which the sale was never consummated and the contract for purchase never became enforceable. Ms. Weaver denies that the purchase and sale transaction was not consummated.

Ms. Weaver asserts that financing was in fact approved, referring to the initial credit approval given at the time of execution of the agreement to purchase, Bonanza's acceptance of her \$1,000 down payment and subsequent delivery of the mobile home, and Bonanza's acceptance of subsequent payments under the agreement.

resale of repossessed mobile homes to transfer title.

³The receipt tendered by Ms. Weaver (Debtor's Exhibit 2) evidencing her \$1,000 down payment to Bonanza is dated December 7, 1990, exactly one week prior to the date shown on the agreement to purchase. The difference in dates was neither explained nor alluded to.

Ms. Weaver concludes that these actions evidence approval of financing. To buttress her contention that financing was approved, Ms. Weaver tendered into evidence two letters she received. The first letter, dated January 22, 1991, is written on Sovran Bank letterhead (Debtor's Exhibit 6) and states in its entirety:

Mary Weaver
Apt. 4-I Race Track St.
Swainsboro, GA 30401

RE: Account Number 732534

Dear Ms. Weaver:

The last payment I received on your account was less than the amount due. You should have paid \$376.92.

Please forward this amount to me.

If you are unable to pay this amount, please call me at your earliest convenience.

Sincerely,
/s/ Mary Newton
Collector
(804) 977-9140
1-800-548-6581
Enclosures⁴

Ms. Weaver tendered into evidence a letter dated February 22, 1991 written on Goldome letterhead (Debtor's Exhibit 7) stating in its entirety:

⁴No evidence was presented or testimony given regarding the enclosures.

Mary Weaver
PO Box 1021
Swainsboro, Ga 30401⁵

This is to advise you that GOLDOME ACCEPTANCE CORPORATION has sold your account to SOVRAN BANK. The recent payment has been forwarded for you.

Please mail your future payments to:

SOVRAN BANK
P.O. BOX 1328
CHARLOTTESVILLE, VA

ZIP 22902

For information you can call:

1-800-548-6581 DORIS PHILLIPS

Thank you,
GOLDOME ACCEPTANCE CORPORATION

Attached to this letter is a note which states, "Sold to Sovran Acct # 732534 Attn: Beth Borne". Ms. Weaver testified that this note was attached to the letter when she received it. The account number on this note is the same as that appearing on the Sovran letter.

Ms. Weaver argues that these letters refer to cash payments made by her to Bonanza and submitted by Bonanza on her behalf via money order to Goldome, and establish an acceptance of financing. The debtor did not introduce any other evidence of affirmative acceptance of financing and did not testify that she

⁵The address given on the first letter corresponds to the address shown on the agreement to purchase executed December 14, 1990, while the address on the letter from Goldome corresponds to the address given on the money orders remitted by Bonanza for Ms. Weaver.

received notification of any approval given beyond the initial conditional approval. The cash payments were intended by Ms. Weaver as payments on her contract; the "WORKSHEET"⁶ portion of the contract specified that the monthly installments were to be \$254.12 each. Ms. Weaver testified that she made three cash payments, two for \$254.12 and one for \$508.16 (representing two months' payments) to Bonanza which were remitted to Goldome, and submitted into evidence copies of three money orders showing Goldome as payor (Debtor's Exhibit 8). The money orders, though, have been endorsed back to Ms. Weaver, and were returned by Goldome to Ms. Weaver in Goldome envelopes which Ms. Weaver herself tendered into evidence (Debtor's Exhibits 11 - 14). In evidence is a letter on NationsBank letterhead⁷ (Debtor's Exhibit 10), which reveals that Goldome had a contract with Richard E. and Mary M. Weaver on a 1986 Champion mobile home. The Weavers' account with Goldome had a loan number of 7325343, which was changed to 3435476 when sold to Sovran Bank.

Contrary to debtor's assertions, these letters do not evidence an affirmative acceptance of financing on Ms. Weaver's contract but rather a confusion by Goldome of this debtor with another "Mary Weaver." The subsequent return of the payments

⁶The caption of this portion of the agreement provides, "WORKSHEET. THIS IS NOT PART OF YOUR CONTRACT. ALL FIGURES ARE ESTIMATES. THEY DO NOT CONSTITUTE AN AGREEMENT FOR CREDIT."

⁷NationsBank was formerly known as Sovran Bank.

indicates that, also contrary to Ms. Weaver's assertions, she had no account with either Goldome or Sovran because financing was denied. Ms. Simon's testimony at hearing established that the initial approval given at the time of execution of the agreement was based on credit history only and subject to final approval of financing by Goldome. The agreement itself supports this condition as it provides that it is subject to acceptance of financing. Ms. Simon testified that when the various documents were submitted by Bonanza to Goldome for approval of financing, approval was denied because Ms. Weaver was no longer employed. I find it significant that debtor neither introduced nor testified to receipt of an approval of any sort subsequent to execution of the agreement. I find that financing was not approved, and that Ms. Weaver never had an account with either Goldome or Sovran.

I find also that the agreement never became enforceable due to the failure to satisfy the condition precedent of approval of financing.

A contract may be absolute or conditional. . .
. In a conditional contract, the covenants are dependent upon each other and the breach of one is a release of the binding force of all dependent covenants.

O.C.G.A. § 13-1-7(a). "The word 'subject' means, being under the contingency of; dependent upon or exposed to (some contingent

action)." Lamb v. United States Sales Corporation, 194 Ga. App. 333, 334, 390 S.E.2d 440, 441 (1990). The words "subject, however, to" create a condition precedent to enforceability. Blue Ridge Apartment Co. v. Telfair Stockton & Co., 205 Ga. 552, ___, 54 S.E.2d 608, 612-3 (1949). "A condition precedent must be performed before the contract becomes absolute and obligatory upon the other party." O.C.G.A. § 13-3-4. Under Lamb and Blue Ridge, this agreement was clearly conditioned and contingent upon acceptance of financing. As financing was not approved, this condition was not satisfied and the agreement is not binding or enforceable as a contract for sale.

Ms. Weaver asserts that upon delivery, title to the mobile home passed to her pursuant to O.C.G.A. § 11-2-401. This Code section provides, in relevant part,

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Code Section 11-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9 of this title), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed upon by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place;
. . . .

Ms. Weaver relies on § 11-2-401 to support the automatic passage of title to the mobile home upon its delivery, ignoring the specific language of this Code section that title passes only when the parties do not agree otherwise. Further, Ms. Weaver ignores the introductory language of this Code section which provides that title passes under this Code section under a contract for sale. Because I have found that the contract for sale never became effective, there can be no passing of title under either the agreement or § 11-2-401. Additionally, the parties explicitly agreed that title to the mobile home would be passed on acceptance of financing. Where the parties agree that title is not to pass until the happening of a condition precedent, there is no contract for sale. State Farm Mutual Automobile Insurance Company v. Sargent, 162 Ga. App. 127, 354 S.E.2d 833 (1982). Debtor stated her understanding that she would receive title to the mobile home at some point following the execution of the agreement. While debtor did not state what event would trigger the transfer of title to the mobile home, it is clear to me that it is the acceptance of financing and final approval by

Goldome which would have precipitated transfer of title, a condition to which the parties "explicitly agreed," thus taking transfer of title in this instance outside of § 11-2-401, and establishing under Sargent that there existed no binding or enforceable contract for sale.

Finally, debtor relies on O.C.G.A. § 11-2-403 to provide her with an ownership interest in the mobile home.

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

(a) The transferor was deceived as to the identity of the purchaser; or

(b) The delivery was in exchange for a check which is later dishonored; or

(c) It was agreed that the transaction was to be a "cash sale"; or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession

regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (Article 9 of this title), bulk transfers (Article 6 of this title), and documents of title (Article 7 of this title).

O.C.G.A. § 11-2-403.

According to Ms. Weaver paragraphs (2) and (3) of this Code section establishes her ownership interest in the mobile home by virtue of an alleged "entrustment" of the mobile home by Goldome to Bonanza and subsequent purchase by her. This argument fails for two reasons. First, the provisions of this Code section have repeatedly been held to apply only to owners of goods. See, e.g., Sunnyland Employees' Federal Credit Union v. Fort Wayne Mortgage Corporation, 182 Ga. App. 5, 354 S.E.2d 645 (1987); McConnell v. Barrett, 154 Ga. App. 767, 769, 270 S.E.2d 13 (1980); United Carolina Bank v. Sistrunk, 158 Ga. App. 107, 279 S.E.2d 272 (1981). Under Sunnyland and McConnell, a foreclosing secured creditor is not an "owner" and cannot be an entruster to whom these provisions would apply. Sunnyland, 154 Ga. App. at ___, 354 S.E.2d at 647; McConnell, 154 Ga. App. at ___, 270 S.E.2d at 15-16. Second, this Code section clearly requires for application a "transfer" to a "buyer in the

ordinary course of business." Because I have found that the contract never became effective and that there was no transfer, I find that O.C.G.A. § 11-2-403 is inapplicable and unavailable to Ms. Weaver to effect a transfer of title in the mobile home to her. Ms. Weaver has no ownership interest in the 1988 Destiny mobile home. The FDIC is the owner.

IT IS THEREFORE ORDERED that the Motion to Avoid Lien is DENIED.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of March, 1995.